78-6179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-

ROBERT WHISENHUNT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

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QUESTIONS PRESENTED

I.

Is Ga. Code Ann. § 26-2101(c), which prohibits the sale or other dissemination of certain defined obscene devices, constitutional?

II.

Was the jury instruction on intent under Ga. Code Ann. § 26-604 constitutional?

III.

Was the jury instruction on the knowledge required for a conviction under Ga. Code Ann. § 26-2101 constitutional?

STATEMENT OF THE CASE

On October 7, 1976, Ira W. Brown, an investigator in the Fulton County Solicitor's Office, entered the Plaza News and Adult Bookstore. (T. 19).[1] Investigator Brown purchased two magazines entitled Slurppy Time Girls and Gay Sex Devices from Petitioner Robert Whisenhunt. (T. 21-22).

Investigator Brown then identified himself and placed Whisenhunt under arrest. (T. 29). The officer then seized paraphernalia openly displayed inside the store.[2] (R. 2, T. 22-28).[3]

Petitioner was charged with distribution and possession of obscene material in violation of Ga. Code Ann. § 26-2101. (R. 3). He was tried and convicted on September 19, 1977, and sentenced to 12 months imprisonment and a $5,000.00 fine. The prison term was thereafter probated upon payment of the fine. (R. 20).

Whisenhunt appealed to the Court of Appeals of Georgia which affirmed his conviction. Whisenhunt v. State, 146 Ga. App. 571, 246 S.E. 2d 691 (1978). The Supreme Court of Georgia denied the petition for writ of certiorari.

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[1] T. refers to the transcript of Petitioner's trial in the State Court of Fulton County, Georgia.

[2] Among the items seized were two air pump penises, one anal tip vibrator, one dual anal tip vibrator, three dildos, six dildos with straps, four double dildos, five electric ball vibrators, four dildos with cranks, nine vibrators, five vibrators with attached sleeves, six artificial vaginas, two artifical vaginas with vibrators, one artificial vagina and rectum, two vaginal aid sleeves, two vaginal aid sleeves with attached vibrators and 14 vibrator kits.

[3] R. refers to the appellate record prepared by the Clerk of the State Court of Fulton County, Georgia.

REASONS FOR NOT GRANTING THE WRIT

I. GA. CODE ANN. § 26-2101(c), WHICH PROHIBITS THE SALE OR OTHER DISSEMINATION OF CERTAIN DEFINED OBSCENE DEVICES, IS CONSTITUTIONAL.

Petitioner attacks the constitutionality of Ga. Code Ann. § 26-2101(c) on the ground that it is an invasion of privacy and that the proscribed devices are not harmful per se.

Petitioner does not contend that the sexual devices are expression constitutionally protected. The issue of whether sexual devices, such as dildos, are expression protected by the First and Fourteenth Amendments, was presented to this Court on appeal and dismissed for want of a substantial federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 76 (1978); Simpson v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 233 (1978).

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C. § 1462 and thereby obscene. United States v. Gentile, 211 F. Supp. 383 (D. Md. 1962). The language in 18 U.S.C. § 1462 has been held to be constitutional. United States v. Orito, 413 U.S. 139 (1973). A state court has applied an obscenity statute to artificial penises. People v. Clark, 304 N.Y.S. 2d 326 (1969).

Ga. Code Ann. § 26-2101 does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in Stanley v. Georgia, 394 U.S. 557 (1969). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973).

Petitioner correctly asserts that the standards or guidelines set forth in Miller v. California, 413 U.S. 15 (1973), used in

determining obscenity in press materials, do not apply to the devices described and prohibited by § 26-2101(c). The Miller guidelines were set up by this Court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of press. The devices prohibited by § 26-2101(c) are neither speech nor press materials and are, therefore, not protected by the First Amendment.

Petitioner compares the Georgia obscenity statute with that dealt with by this Court in Griswold v. Connecticut, 381 U.S. 479 (1965). However, in Griswold, this Court dealt with statutes prohibiting the use of contraceptives and recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." Id. at 485.

The Georgia statute does not blanketly prohibit the use of devices described in § 26-2101(c). There is an exception whereby persons, married or single, can avail themselves of such devices. See Ga. Code Ann. § 26-2101(e). The procedure required in this exception is similar to that required for the dispersing of most prescription drugs, including those for birth control.

The devices described in Ga. Code Ann. § 26-2101(c) do not constitute protected expression and do not infringe upon any right of privacy; therefore, the State of Georgia may lawfully regulate these devices.

II. THE JURY INSTRUCTION ON INTENT UNDER GA. CODE ANN. § 26-604 WAS CONSTITUTIONAL.

The trial court's instruction on intent, incompletely and inaccurately quoted in Petitioner's brief, was as follows:

> . . . The acts of a person of sound mind and discretion are presumed to be the product of the person's will. This presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act. This presumption may be rebutted. A person will not be presumed to act with criminal intention, but you may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

(T. 141). The trial court had previously instructed the jury that the state had the burden of proving beyond a reasonable doubt every material allegation of which Petitioner stood accused and that the Petitioner was presumed innocent until that presumption was overcome by sufficiently strong evidence. (T. 138-39).

Petitioner alleges that the instructions shifted the burden of proof to the accused and relieved the state of the burden of proving the element of intent. (Petitioner's Brief, p. 6).

Of course, an instruction to the jury may not be judged in isolation but must be viewed in the context of the charge as a whole. Cupp v. Naughten, 414 U.S. 141 (1973).

Petitioner cites numerous Fifth Circuit cases in support of his allegation that the charge in question was burden-shifting. However, in United States v. Trexler, 474 F. 2d 369 (5th Cir. 1973), that court said:

> . . . While we do not permit a jury charge which shifts the burden of proof to the defendant through the use of a presumption, this Circuit does approve an instruction permitting the jury to infer intent from the natural and probable consequences of a defendant's acts.

Id. at 371. (Citations and footnote omitted).

Viewing the charge as a whole, as must be done, it is clear that the trial court instructed the jury that the burden of proving all elements of the offense remained with the state and that Petitioner would be entitled to an acquittal until the state overcame the presumption of innocence beyond a reasonable doubt. (T. 138). The instruction complained of was not burden-shifting and plainly instructed the jury that the state bore the burden of proving the elements of the offense charged.

III. THE JURY INSTRUCTION ON THE KNOWLEDGE REQUIRED FOR A CONVICTION UNDER GA. CODE ANN. § 26-2101 WAS CONSTITUTIONAL.

An essential element in the crime of distributing obscene materials in Georgia is that the accused knows the "obscene nature" of the material. Ga. Code Ann. § 26-2101(a). Knowing is defined as either actual knowledge of the obscene contents or "knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." Id. At Petitioner's trial, the judge charged the jury concerning these principles. (T. 142).

Previous appeals that such a charge is unconstitutional have already been dismissed by this Court for want of a substantial

federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 76 (1978); Teal v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 79 (1978); Simpson v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 233 (1978). Also, this Court has recently denied writs of certiorari concerning this issue. See Wood v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 247 (1978); Allen v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 247 (1978).

The trial court's charge is consistent with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when this Court held that the person charged with the offense of mailing obscene material must know or have notice of the contents of the material.

> The inquiry, in proceedings under the [obscenity] statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. [Emphasis added]. Rosen v. United States, 161 U.S. 29, 41 (1896).

The Georgia statute is similar to New York statutes dealt with by this Court in Mishkin v. New York, 383 U.S. 502 (1966) and Ginsberg v. New York, 390 U.S. 629 (1968).

The Mishkin case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter" and it defined the required mental element in these terms:

> . . . A reading of the statute [Section 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . . Mishkin v. New York, 383 U.S. at 510. See also Ginsberg v. New York, 390 U.S. at 644.

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while § 1141 of the New York Penal Law requires the accused to be "in some manner aware." The statute dealt with in Ginsberg defined knowingly as "knowledge" of, or "reason to know" of the character and the content of the material.

Neither Mishkin nor Ginsberg required actual knowledge of the obscenity of the material. Both cases were reviewed and followed in Hamling v. United States, 418 U.S. 87 (1974), where this Court construed 18 U.S.C. § 1461, and held:

> To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the constitution. Id. at 123-24.

In the case of Kuhns v. California, 431 U.S. 973 (1977), this Court denied a petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." California v. Kuhns, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Proof of scienter may be made by circumstantial evidence. To prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material is proof of knowledge of the character of the material by circumstantial evidence.

At Petitioner's trial, Georgia law required and the jury was instructed that the state had to prove, as a bare minimum, that Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" was required by Rosen v. United States, supra; "in some manner aware" was sufficient in Mishkin v. New York, supra; "reason to know" was sufficient in Ginsberg v. New York, supra; "be aware of the character of the matter" was sufficient in California v. Kuhns, supra; and proof of knowledge of the legal status of the material was not required. Hamling v. United States, supra.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Glenn Zell
Attorney for Petitioner
Suite 620
66 Luckie Street, N.W.
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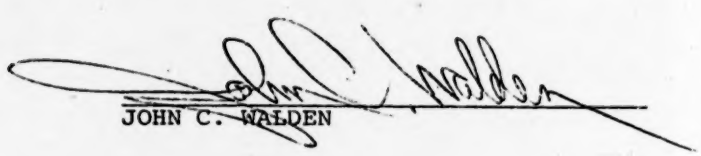
This 9th day of March, 1979.



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